

**United States Court of Appeals  
For the Ninth Circuit**

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THE PACIFIC TOW BOAT COMPANY, a corporation; and  
V. E. STUCHELL, WILLIAM D. CARPENTER, HARRY W.  
TUCHELL, JR., M. A. WYMAN, D. E. WYMAN and M. H.  
WYMAN, Co-Partners Doing Business as Eclipse  
Lumber Co., *Appellants*,

vs.

STATES MARINE CORPORATION OF DELAWARE,  
a corporation, *Appellee*.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

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**APPELLANTS' BRIEF**

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*Proctors for Appellants.*

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Seattle 4, Washington.

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## INDEX

	<i>Page</i>
Jurisdiction .....	1
Concise Statement of the Case.....	2
Specification of Errors.....	4
Argument .....	5
Summary .....	5
Facts about the vessels.....	6
Chronology .....	8
1. Presumption of fault ignored evidence and contrary to legal principle.....	9
a. Substitution of line.....	9
b. Participation by crew of consignee steamer..	11
c. Scows safe and at rest.....	11
d. Explanation for collision.....	12
2. Standard of care exercised on COTTON STATE was negligence .....	13
a. COTTON STATE's witnesses able to see every- thing .....	13
b. Propeller started without clearance from lookout .....	18
c. No effort to avoid or minimize damage.....	21
3. Tug did not cause No. 15 to drift.....	25
Conclusion .....	26
Appendix A—Table of Exhibits.....	27

## TABLE OF CASES

<i>Achilles, The</i> , S.D.N.Y., 291 Fed. 636.....	15
<i>Barbarino v. Stanhope S.S. Co.</i> , 2 Cir., 151 P.(2d) 553 .....	5
<i>Buffalo, The</i> , 2 Cir., 56 F.(2d) 738.....	9
<i>Burns Bros. v. Long Island R. Co.</i> , 2 Cir., 176 F.(2d) 406 .....	9
<i>East Indian, The</i> , 2 Cir., 62 F.(2d) 242.....	24
<i>Hektor</i> , D. Md., 1935 A.M.C. 336.....	9

	<i>Page</i>
<i>Kreste v. United States</i> , 2 Cir., 158 F.(2d) 575.....	5
<i>Liberty</i> , E.D. Pa., 1936 A.M.C. 55.....	20
<i>New York Trap Rock Corp. v. Christie Scow Corp.</i> , 2 Cir., 162 F.(2d) 624.....	5
<i>New York, New Haven and Hartford R. Co. v.</i> <i>Grey</i> , 2 Cir., 240 F.(2d) 460.....	5
<i>Nounes v. United States</i> , S.D. Texas, 83 F.Supp. 11	20
<i>Patterson, The C. W.</i> , 2 Cir., 10 F.(2d) 712.....	6
<i>Redwood, The</i> , 9 Cir., 81 F.(2d) 680 .....	14
<i>Rusted v. Nicaragua Mail Steam Navigation &amp;</i> <i>Trading Co.</i> , S.D.N.Y., 56 Fed. 1022.....	9
<i>Seaboard No. 63, The</i> , E.D.N.Y., 69 F.Supp. 246.....	20
<i>Segrave Transp. Co. v. Eskay Coal &amp; Fuel Co.</i> , 2 Cir., 205 F.(2d) 257.....	24
<i>Southport Transit Company v. Avondale Marine</i> <i>Ways</i> , 5 Cir., 234 F.(2d) 947.....	24
<i>States Steamship Co. v. Permanente Steamship</i> <i>Corp.</i> , 9 Cir., 231 F.(2d) 82.....	14
<i>States Steamship Company v. United States</i> , 9 Cir., 259 F.(2d) 458.....	5-6
<i>Titus v. S.S. Santorini</i> , 9 Cir., 258 F.(2d) 352.....	25
<i>United States v. Seas Shipping Co.</i> , E.D.N.Y., 92 F.Supp. 902 .....	9
<i>Van Camp Seafood Co. v. Di Leva</i> , 9 Cir., 171 F. (2d) 454 .....	14
<i>Weishaar v. Kimball S.S. Co.</i> , 9 Cir., 128 Fed. 397....	26

## STATUTES

28 U.S.C. 1333.....	2
28 U.S.C. 1229, 2107.....	2

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Doing Business as Eclipse Lumber Co.,  
*Appellants,*

vs.

STATES MARINE CORPORATION OF DELAWARE,  
a corporation,  
*Appellee.*

No. 16374

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

### APPELLANTS' BRIEF

#### JURISDICTION

This is a collision case brought in admiralty in the United States District Court for the Western District of Washington, Northern Division. States Marine Corporation of Delaware (States Marine) libeled the tug LEA MOE and the scow ECLIPSE No. 15 (No. 15) *in rem* and their respective owners, The Pacific Tow Boat Company (Pacific) and E. W. Stuchell, *et al.*, a partnership doing business as Eclipse Lumber Co. (Eclipse), *in personam* for damages to its steamer COTTON STATE (Libel, Tr. 3). Respondents appeared, claimed their vessels, and each answered pleading a general denial



and affirmative fault on the part of libelant (Pacific's Answer, Tr. 9; Eclipse's Answer, Tr. 19). Thereafter Eclipse filed its cross libel *in personam* against libelant for damages to the scow No. 15 and her cargo (Cross Libel, Tr. 26). The District Court had jurisdiction of the libel and cross libel. 28 U.S.C. §1333.

Final decree of the District Court in favor of libelant was entered on December 10, 1958 (Decree, Tr. 65). Appellants thereafter gave Notice of Appeal (Tr. 69) and filed appropriate security (Tr. 71) within ninety days after entry of the decree. Jurisdiction of the appeal is sustained. 28 U.S.C. §§1291, 2107.

### CONCISE STATEMENT OF CASE

This litigation arises out of a collision between the propeller of the steamer COTTON STATE while slowly rotating on its turning or jacking gear and the lumber laden and "dumb" scow No. 15 at 1845 hours on January 10, 1957, at Everett, Washington. Five minutes before the collision the tug LEA MOE had brought two scows, No. 15 and ECLIPSE No. 25 (No. 25), close-coupled and in tandem to make an integral unit, along the starboard side aft on the COTTON STATE which had just berthed port side to and bow in at the Port Dock. A mooring line from the COTTON STATE had been placed leading from amidships on the steamer to the outboard forward corner of the No. 25 in substitution for the tug's towing hawser. Thereafter the No. 15, still close coupled to the No. 25, drifted inboard under the COTTON STATE's counter and was impaled on the propeller. The tug LEA MOE proposed to shift the No. 15 from her po-



sition aft on the COTTON STATE after the mooring line was substituted for her tow line, but while she maneuvered to do so collision occurred. Damage to the scow was on the port side about forty feet forward from her after end.

The COTTON STATE required drydocking and replacement of the propeller, three blades having been damaged. The No. 15 was holed, causing her to dump her cargo and to require extensive hull repairs. States Marine sued No. 15 and her owner, Eclipse, and the LEA MOE and her owner, Pacific, for damages ultimately stipulated at \$22,500.00. Eclipse filed a cross libel against States Marine only for agreed damages of \$9,985.25.

The trial court, the Honorable John C. Bowen, gave libellant its damages in full against both Pacific and Eclipse while denying Eclipse's cross libel against States Marine. Eclipse, however, was awarded recovery over from Pacific for its scow and cargo damages and anything it might have to pay States Marine. Both Pacific and Eclipse appeal with regard to the award of any damages to and the dismissal of Eclipse's cross libel against States Marine.

The issues raised on appeal are these:

1. Was this a matter to be decided primarily by application of admiralty's presumption of fault against a moving vessel which strikes a stationary one?
2. Did those on the COTTON STATE, which was the consignee of the scows, exercise proper seamanship under the circumstances? Without protest, they actively par-

ticipated in tying up the scows and at the same time started up the propeller which subsequently damaged the No. 15 by striking her over an extended length of time thereby not avoiding or minimizing damage.

3. Was the tug LEA MOE negligent after the mooring line in substitution for its towing hawser was secured from the COTTON STATE to the scow No. 25 to which No. 15 was close-coupled making them one integral unit?

These questions arise generally on the whole record, and in more detail are raised by appellant's Statement of Points on Appeal (Tr. 74) and the following:

### SPECIFICATION OF ERRORS

1. The basic disposition on the merits by simply applying the presumption of fault against a moving vessel which strikes a stationary one (Opinion, Tr. 580, 581, 584, incorporated in Finding 16(a) and 18, Tr. 60, 61) ignored the evidence and was contrary to legal principle.

2. The trial court failed to apply a proper standard of care on the part of those on the COTTON STATE when it made a "finding of fact" that they were not negligent or contributorily negligent (Finding 18, Tr. 61, as followed in Conclusion 2, Tr. 62).

3. The finding that after the ship's line was attached to the No. 25 and the tug's towing hawser was taken in those on the tug allowed the No. 15 to strike the propeller was clearly erroneous (Opinion, Tr. 583, incorporated in Finding 14, Tr. 59).

## ARGUMENT

### Summary

1. The measure of the trial court's decision on the merits is no more than application of admiralty's presumption of fault in favor of a moored vessel damaged by one under way. But the presumed lack of control of a vessel which strikes another at rest does not apply when for perhaps five minutes before collision the former vessel was safe and controllable by those on the latter which was the consignee of the former and where the officers and crew of the stationary vessel actively participated in handling and tying up the ultimately moving vessel. With respect to the relations between COTTON STATE on one hand and the tug and scows on the other the trial court (Opinion, Tr. 585, incorporated in Conclusions 2, 3, 4, Tr. 62) failed to appreciate the "relationship of the parties in their entirety" as required by authority. *New York Trap Rock Corp. v. Christie Scow Corp.*, 2 Cir., 162 F.(2d) 624, 627.

2. In a case tried to the court a "finding" that a party is not negligent or contributorily negligent is not a finding of fact which must be accepted unless "clearly erroneous." It is a conclusion of law as freely reviewable as any conclusion of law strictly so called. *Barbarino v. Stanhope S. S. Co.*, 2 Cir., 151 F.(2d) 553; *Kreste v. United States*, 2 Cir., 158 F.(2d) 575; *New York, New Haven and Hartford R. Co. v. Grey*, 2 Cir., 240 F.(2d) 460. Therefore, the appellate court should make those findings which the trial court did not and to them apply the proper legal standard of care. *States*

*Steamship Company v. United States*, 9 Cir., 259 F. (2d) 458. "The proper standard of care is a question of law." *The C. W. Patterson*, 2 Cir., 70 F. (2d) 712.

3. No. 15 and No. 25 were at all times before collision close-coupled forming one integrated unit. When the COTTON STATE's line was substituted for the tug's towing hawser they were safe and under control by those on the COTTON STATE. From then until after collision the tug did not impart any motion to the scows to cause the No. 15 to drift under the steamer's counter and to collide with the propeller.

### **Facts About the Vessels**

The COTTON STATE is a C-2 type vessel. Exhibit 5 shows her profile, hull outline, and general arrangements. Undisputed important particulars are: a beam of 63.1 feet (Tr. 36); propeller diameter—19.5 feet (Tr. 117); propeller tips inboard from starboard side of hull—21.8 feet. She had a four-bladed propeller which was rotated on the jacking gear in an astern, or counter-clockwise looking from astern, direction at a speed of one revolution in 7 or 8 minutes (Tr. 38). Rotation of the propeller always results when the jacking gear is operated. The jacking gear consists of an electric motor and appropriate gears which when operated rotates the turbine to cool or warm its blades uniformly. Three of the four propeller blades were badly bent (Exs. 9-15, Tr. 254). The tip of one blade was missing before the casualty (Ex. 15, Tr. 263).

The No. 15 and No. 25 are square ended, wooden cargo scows. Each is 110.4 feet in length and 37.9 feet in



breadth (Tr. 36). On the four corners of each scow are stanchions used for fastenings. Those on the stern of the No. 25 and the bow of the No. 15 were used to close-couple the two scows into an integral unit (Tr. 37, 543). The stanchion on the No. 25's forward starboard corner was used for the tug's towline (Tr. 37), and in turn for the substituted tieup line passed from the COTTON STATE (Tr. 546).

Each scow was loaded with lumber. McLaughlin, the COTTON STATE's chief officer, described the lumber on each scow as 10 to 14 feet high, stowed out to the sides and in about 10 feet from each end, and level on the top so he could see the cargo (Tr. 132, 143, 159). Captain Keezer of the LEA MOE was in substantial agreement (Tr. 442). Damage to the No. 15 is shown on Exhibit A-1. It consisted of two gashes (Tr. 433). They were on the port side about forty feet forward of the stern or thirty feet forward of the end of the lumber cargo.

The tug LEA MOE is a diesel powered vessel of 265 horsepower, 42 gross tons, 28 net tons, registered length of 60.9 feet and breadth of 18.8 feet. She is equipped with pilot house controls of the main engine (Tr. 36). Her normal complement for towing jobs such as involved herein is three men (Tr. 510, 568).

## Chronology

1835—COTTON STATE finished with engines (deck and engine room log and bell books, Exs. 1, 2, 6, 8). Ship tied up (Tr. 185).

1838—Kane inspection aft made three minutes after he boarded COTTON STATE at 1835. Observed leading scow (No. 25) midship and trailing scow (No. 15) breasted off from the stern about 25 to 30 feet (Tr. 361).

1840—Jacking gear engaged (engine room log, Ex. 6). Jacking gear started up 4 to 5 minutes after finished with engines per Pilar (Tr. 398, 402), 3 to 5 minutes per Green (Tr. 386). Jacking gear engaged without communication to deck because "assumed" everything clear (Tr. 368, 402, 406).

1840—Tug LEA MOE brought lumber scows alongside (deck log, Ex. 1, Tr. 185).

Three to four minutes between substitution of lines and collision (Tr. 470, 550). Pilar in engine room "five to ten minutes" after having engaged jacking gear (Tr. 406). No indication of trouble before Pilar (Tr. 407) or Green (Tr. 372) left engine room.

1845—Collision (deck and engine room logs (Exs. 1, 6, Tr. 185).

Propeller striking barge for three to four minutes without effort to shut off (Tr. 298).

1847—Kane entered engine room and during inspection found jacking gear out (Tr. 324).

## Presumption of Fault Ignored Evidence and Contrary to Legal Principle

Admiralty's presumption against a moving vessel striking a stationary one is no more than application of the doctrine of *res ipsa loquiter*. Presumed lack of control on the part of the drifting vessel is the basic ingredient. *The Buffalo*, 2 Cir., 56 F.(2d) 738; *Burns Bros. v. Long Island R. Co.*, 2 Cir., 176 F.(2d) 406. When a scow tied to an oceangoing vessel strikes the latter's propeller, inquiry always concerns who manipulated the mooring of the scow. Illustrative cases imposing liability upon a party guilty of improper exercise of control of mooring lines are:

*United States v. Seas Shipping Co.*, E.D.N.Y.,  
92 F.Supp. 902;

*Rusted v. Nicaragua Mail Steam Navigation  
& Trading Co.*, S.D.N.Y., 56 Fed. 1022;

*Hektor*, D. Md., 1935 A.M.C. 336.

In this matter control was in the hands of those on the COTTON STATE and they should explain how the scows drifted.

### a. Substitution of Line

Scows No. 15 and No. 25 were towed alongside the COTTON STATE by the LEA MOE towing on a short hawser extending for a distance of eight to ten feet over the stern of the tug to where it was attached to a stanchion at the forward starboard corner of No. 25. There were short coupling lines fastened between the two corner stanchions aft on the No. 25 and extending to the two



forward corner stanchions on the No. 15 which was the after scow in the tandem bow. The two scows were close-coupled with a foot or so clearance between them (Tr. 37). So secured the scows formed a single integral unit (Tr. 522, 527, 528). The manner in which they were lashed prevented kinking or wobbling (Tr. 444). They were still close coupled in a single unit after collision (Tr. 153, 221, 230, 472).

After the scows were brought alongside the COTTON STATE one of the steamer's mooring lines was passed to the tug's deckhand on the No. 25 (Tr. 546). This was customary and expected (Tr. 413-414). The tug's deckhand, Hafey, secured the mooring line on the same stanchion as the tug's towing hawser, but under the latter. He secured the mooring line with "a round turn around the stanchion and tied it with a bowline" (Tr. 546, 563). After the mooring line was fastened on the No. 25 the COTTON STATE's boatswain and chief officer took control of it and tightened it on a midship cleat on her cabin deck (Point 1, Exh. 5, Tr. 204; Tr. 140). There was never any protest from the COTTON STATE as to the manner of tying up (Tr. 468).

When the slack was out of this mooring line the tug's deckhand cast off the towing hawser without disturbing the former (Tr. 547). Thereafter the tug maneuvered away from the scows to take position to move the No. 15 forward on the COTTON STATE. Analysis must start with recognition that the mooring line was substituted for the tug's towing hawser (Tr. 179, 181). McLaughlin agreed:

“Q. So in effect your line had been substituted for the tug’s line, had it not?

A. Well, if you want to call it that, sir.” (Tr. 171).

It was an event intervening between what went on before and what was to occur thereafter.

### **b. Participation by Crew of Consignee Steamer**

The mooring line was affixed on the “usual” place on the No. 25 (Tr. 474). It “was perfectly all right” according to Chief Officer McLaughlin who acquiesced and participated in the way the scows were to be tied up (Tr. 172). He recognized what was going on:

“Q. (By Mr. Biele): During the time that these scows were brought alongside and until the line was secured by you and the boatswain in substitution for the tug’s line, did you make any protest or any objection to the way in which it was being done?

A. No, sir.

Q. You stood mute? A. Sir. (119)

Q. You stood mute? You didn’t say anything?

A. No.” (Tr. 178-179)

### **c. Scows Safe and at Rest**

After the substitution of the line the two scows were safe. They were at rest (Tr. 141, 475, 559). McLaughlin’s only complaint was that the scows could not be operated (Tr. 172). He was not thinking of danger because he “didn’t see the barge underneath the stern or anything” (Tr. 173). Dusevoir recalled the situation thus:

“Q. Well, did you see the scows in any trouble before you finished securing the line?

A. The scows themselves, no.

Q. Then is it a fair statement that at the time you got the line secured the scows were still in good shape? A. Yes, sir.” (Tr. 213).

All of the foregoing was five minutes before the scow struck the propeller (Tr. 185).

#### **d. Explanation for Collision**

The COTTON STATE’s mooring line held the two scows (Tr. 228). Dusevoir after securing the mooring line left it unattended so he was unable to state what had happened to it thereafter (Tr. 212). We do know the end on the No. 25 was still intact following the accident (Tr. 563). McLaughlin agreed that if the mooring line were not controlled it would allow the scows to drift:

“Q. This line that was substituted for the tow-line when tightened as you have described would keep the forward scow in towards the ship, would it not, if it were tightened? A. Yes.

Q. And if it were slacked off it would allow the scows to drift astern or out from the ship, would it not? A. Yes, it would have if it were.” (Tr. 179).

Captain Keezer from the tug was in accord:

“We used the line there because it serves the double purpose of holding the scow from going endways and also holds it tight against the ship.” (Tr. 475).

The only possible explanation for collision was Captain Keezer’s. As an integral unit the scows were allowed

by the COTTON STATE's crew to pivot on the side of the ship when the mooring line was not controlled (Tr. 508-510). A slight wind blowing toward the steamer's stern was the motive force (Tr. 468). If the scows were held by the mooring line between the steamer and the No. 25 the distance between the No. 15 portside and the propeller tips was about twenty feet for when the tug took her line aboard the forward scow was tight against the starboard side amidships (Tr. 510). Examination of Exhibit 5 showing the hull outline of the COTTON STATE readily confirms this. In the words of Fulmer who was closest to the stern area :

“Q. Did the trailing barge or the aftermost barge, was that in close alongside the offshore side of the COTTON STATE when you first observed it?

A. The barge that was the trailing barge, as you call it, was not in close, but she—after the boatswain had made this fast she began to come in, and the tug went to get it and move it. Do you understand what I mean?” (Tr. 221-222).

Further confirmation that the scows drifted while attached to the steamer is found in the fact that after the No. 15 was cleared the No. 25 was further back on the COTTON STATE than she was when the substitution of the line was effected (Tr. 505, 558).

## **2. Standard of Care Exercised on Cotton State Was Negligence**

### **a. Cotton State's witnesses able to see everything**

Appellants do not concede the tug or scows were guilty of any fault with respect to lights or lookout because it was after technical sunset, but assuming for sake of



argument that they were, libellant should get no comfort. *States Steamship Co. v. Permanente Steamship Corp.*, 9 Cir., 231 F.(2d) 82, 86, held it not the purpose of the law "to establish as a hard and fast rule that every vessel guilty of a statutory fault has the burden of establishing that its fault could not by any stretch of the imagination have had any causal relation to the collision no matter how speculative, improbable or remote."

In *The Redwood*, 9 Cir., 81 F.(2d) 680, 687, this court found that a vessel operated with defective lights was not at fault because the other vessel saw her "when she was about half a mile away and any purpose served by the light could not have aided more than an actual view of the vessel." Subsequently *Van Camp Seafood Co. v. Di Leva*, 9 Cir., 171 F.(2d) 454, arose over a matter wherein it was contended a vessel was guilty of statutory faults because navigated with improper lookout and lights. By way of answer this court held neither the absence of a masthead light nor the questionable conduct of a lookout could possibly have contributed to the collision when the complaining vessel at all times saw the other one. The principle of these cases control here where those on the COTTON STATE saw, accepted, and participated in tying up the scows alongside without protest.

The trial court found that visibility was "good" but technically after sunset and dark (Finding 11, Tr. 57). Because the two scows were not lighted and no one was aboard the No. 15, she and the LEA MOE were condemned for lack of lights and a lookout (Finding 16, Tr. 59).

Without comment the COTTON STATE was absolved of fault, presumably because her witnesses could not see what was going on directly under their eyes. This, it is submitted, is absurd. On their own testimony all of the libellant's witnesses clearly saw, or could have seen, the situation presented from start to finish. Those who saw the scows did nothing. The others stand self-convicted of improper seamanship. See *The Achilles*, S.D.N.Y., 291 Fed. 636.

Kane, libellant's night engineer, boarded the COTTON STATE at 1835 hours. About three minutes later he took a look around on the steamer's stern. He then saw the two scows, the trailing one being "offshore perhaps twenty feet" (Tr. 330). Further on he testified, "the tug and the first barge were in the midship area \* \* \* *the trailing barge was breasted off the vessel*. That means it was away from the vessel \* \* \* about twenty-five to thirty feet" (Tr. 360-361). (Emphasis added). We must assume Kane saw no danger or he would have taken avoiding action (Tr. 360-361). His sighting is particularly significant because the LEA MOE landed the scows with the No. 15 about twenty feet outboard of the propeller tips; and if the mooring line from the ship was held the No. 25 would have remained against the COTTON STATE's side keeping the No. 15 breasted away from the propeller (Tr. 507-510).

Fourth Mate Judy working on the bridge "just looked out and I seen them (tug and scows) coming and I kept on with my work" (Tr. 98). When he ties up scows he does not rely upon a crew member to watch clearance in the propeller area—he does it himself (Tr. 105).

COTTON STATE'S deck log (Exh. 1) notes the matter was "witnessed by chief mate." He conceded "there was plenty of illumination that night" (Tr. 160) and he saw the scows coming alongside (Tr. 417). He confided to Boltz, "I seen a barge come into the propeller" (Tr. 310). At his discovery deposition McLaughlin, who was at least ten feet above the top of the lumber cargoes (Tr. 158), testified as to visibility and need of lights:

"Q. In January what was the condition of the daylight? A. Oh, it was day still.

Q. It was still daylight?

A. Yes. It was cloudy that day. I mean the sun wasn't shining.

Q. At the time of the accident it was light outside? A. Oh, yes.

Q. Or was it dark?

A. It was light; light enough you could see. It was getting dusk, you know.

Q. Did you have to have any lights, or were you using any lights for this procedure of pulling these scows alongside? A. No, sir." (Tr. 161)

On direct examination at the trial McLaughlin testified:

"Q. By the way, what was the condition of the light or darkness at that time?

A. Well, it was very dark at that time, but you could see everything around by the lights on the ship.

Q. What was the condition of the visibility?



A. Well, I could see good, sir, from the lights.”  
(Tr. 132)

After being reminded of his discovery deposition testimony, McLaughlin on redirect examination responded to his employer’s proctors questioning:

“Q. Now, Captain, will you tell us again what your testimony was as to the hour of sunset on January 10th?

A. Well, I said it was daylight at that first testimony, and I will say that I found that I was incorrect at that (127) time, but I was referring to the visibility that I could see then, because I could see the top of the tug away from it and you could see everything around at that time.” (Tr. 185)

Boatswain Dusevoir was candid:

“Q. Well, you had a birdseye view of the scow?

A. Yes, sir.

Q. From where you were standing could you see back aft to the stern of the ship, too?

A. Yes” (Tr. 212).

On redirect examination he let the cat out of the bag:

“Q. From the position that you described in answer to a question by Mr. Biele at the accommodation ladder looking down on the lumber on the scow was it possible for you to determine where the stern end of the tow was (159) with reference to the stern of the COTTON STATE?

A. I think it may have been possible but I didn’t do it, sir.” (Tr. 213)

The third member of libelant’s crew on deck was Fulmer stationed in the vicinity of No. 4 hatch “stand-

ing by the rail watching what was going on" (Tr. 206). He testified that he was "in a position" to see the warning board with the red light suspended from the railing on deck before the No. 15 drifted into contact with it and thereafter further inboard to the propeller (Tr. 226). His other testimony on sighting and visibility was:

"Q. All right. Now, while you were in that position, did you (165) observe any tug and barges approaching the offshore side of the vessel?

A. Certainly I observed them. That's my job." (Tr. 218).

"Q. From where you were could you see back towards the propeller area?

A. I could see back—Judge, your Honor—

The Court: That is not required, Mr. Fulmer.

A. O.K.

The Court: Just answer the question, and when you have finished that it is his responsibility to ask another.

A. Yes, I can see." (Tr. 230)

#### **b. Propeller started without clearance from lookout**

Libelant's deck and engine room logs record that at 1840 hours the jacking gear was engaged and the scows were brought alongside. This coincidence puts it on the horns of a dilemma. Either the scows were then safe and under the control of the COTTON STATE for some time before collision as we contend, or if any danger then existed, the steamer stands self-condemned for starting up the propeller without definite assurance about the condition of clearance at her stern area or for

not sending immediate word to the engine room to stop the propeller if it was menaced.

Green and Pilar, who engaged the jacking gear, testified:

“Q. After you get the ‘Finished with Engines’ bell, how soon is the turning gear or jacking gear engaged?”

A. In four or five minutes it is engaged. If the ship is coming in to port, the Second Mate is back aft, and he usually checks to see that everything is clear. If there is anything there, we know almost immediately. We will know immediately that it isn’t clear and we wait for the Clear—the moment we get the ‘Finished with Engines’ and we don’t hear anything from the bridge, we engage it immediately after ‘Finished with Engines’ which is three or four minutes.” (Pilar Tr. 402)

“Q. When you engaged the turning gear at this time did you inform any of the deck officers that you were engaging the turning gear?”

A. No.

Q. Before the turning gear was started had you determined whether there were any barges or scows or vessels in the vicinity of the propeller?

A. No.

Q. Had you determined whether there was a watch maintained on the stern to see if everything was clear in the vicinity of the propeller?

A. No.” (Green Tr. 367-368)

Legally the failure of those on the COTTON STATE to look astern in order to determine the condition of clearance or likelihood of damage before starting the pro-

PELLER was negligence. *The Seaboard No. 63*, E.D. N.Y., 69 F.Supp. 246; *Liberty*, E.D. Pa., 1936 A.M.C. 55; *Nounes v. United States*, S.D. Texas, 83 F.Supp. 11.

Several of the witnesses recognized the need for definite clearance from the deck before the propeller was started up. Knowles, a marine surveyor used by both sides, described the practice of prudent seamen "is that you get permission from the bridge. You are notified that the stern area is clear" (Tr. 426-427). Boltz, COTTON STATE's chief engineer, explained that the deck department notified those in the engine room "when they start the engine they have to notify us that everything is clear—they always do" (Tr. 302). Further on Boltz testified:

"Q. I think I have asked this before, but before you start the jacking gear no one from the engine room comes up to look at the propeller, you rely on the deck department?

A. Sure, because there is a licensed deck officer in the vicinity of the stern to notify us in case there is any obstruction in the vicinity of the propeller.

Q. And you depend on him?

A. I certainly do. He is a qualified man." (Tr. 306-307)

Kane was in accord:

"Q. Mr. Kane, in your experience in the Coast Guard and the Merchant Marine, have you observed the practice of checking the clearance conditions at the stern of a vessel before starting up the jacking gear? A. Yes.

Q. Do you know whether that was done on this occasion or not?

A. Before the jacking gear was engaged?

Q. Yes. A. No. [304]

Q. Such an inspection has a purpose, does it not, Mr. Kane?

A. Yes, it has.

Q. What is the purpose, if you know?

A. The purpose is to make certain that the propeller is clear and no obstructions are present to cause damage to the propeller." (Tr. 339)

### **c. No effort to avoid or minimize damage**

Damage to three blades of the COTTON STATE's propeller meant its rotation continued for at least three and a quarter to four minutes after the initial striking of No. 15 (Tr. 298). Rotation stopped eventually when excessive electrical current required to turn the jacking gear's motor tripped the overload device. An explanation for this is found in Boltz' description of the damage as three blades "badly bent on the trailing edge and one was completely bent, the tip was bent down towards the hub" (Tr. 254). Apparently the obstruction was sufficient to "completely bend" the blade and to trip out the safety device when the last blow was struck.

Surveyor Knowles found the No. 15 showing she had been struck twice. Her after cut was the smaller of the two and caused less damage. It appeared to be the first cut, suggesting the scow drifted astern between strikings. In terms of cost of repairs the second cut added approximately 30 per cent to Eclipse's bill (Tr. 424-426).



What was done on the COTTON STATE to avoid or minimize damage? McLaughlin knew the propeller was going to be turned over (Tr. 174). When questioned about how long it would take to notify the engine room to stop the propeller's rotation he replied:

“It wouldn't be a matter of but a few minutes. A few seconds, rather, not minutes.” (Tr. 180)

According to Dusevoir there was no trouble “immediately” after tying up the substitute mooring line (Tr. 205). According to McLaughlin, “I don't know when I done it but I automatically turned around and looked aft, and at that moment I saw the barge—the lumber is all I could see, the top of the lumber jam under the counter” (Tr. 142-143). When he saw the after barge coming under the stern of the vessel he walked back to the stern area via his room. His time to reach the stern was, “I don't think it would take more than a minute, sir” (Tr. 144). Then standing on the stern and looking over the starboard side he observed the lines supporting a warning board and electric light wire between the ship and the lumber cargo. Considering that the propeller was slowly chewing up the scow over a period of perhaps four minutes, what followed is incredible for a chief mate who has served as master.

“Q. Now, what happened thereafter, Captain? What did you observe?”

A. Well, then I walk over to the port side to see if the light there was working, and that was in working condition. Then I just came back to the other side and I waited till the barge pulled—the tug pulled the barge away.” (Tr. 145)

“Q. Now, as the chief mate, do you have the authority to call up the engine room and tell them to stop the propeller if it’s rotating and something is menacing it?

A. Yes; if I saw it, I could do that.

Q. You didn’t do that on this occasion?

A. When I got aft the barge was against the hull of the ship, the lumber, and I didn’t call up. I didn’t think [121] of it.” (Tr. 180).

Fulmer, standing on the deck watching what was going on, described his conduct:

“Q. All right. When you saw this after scow go under or against the side of the ship you indicated you would have done anything to have helped, did you not? Did you do anything?

Q. I didn’t only indicate it, I would have.

Q. Well, did you do anything?

A. How am I going to get on the scow? I’m a sailor on deck. How am I going to get on that scow to do anything? I cannot do that. I can only take orders from them. I’ll give them anything they’d have hollered for.

Q. Did you know at that time that the propeller was turning?

A. I did not know the propeller was turning.

Q. Would you have called the engine room if you had known the propeller was turning?

A. I would have notified Mr. McLaughlin.

Q. You didn’t do that, however?

A. I did not know it was turning.” (Tr. 228-229)

Kane (Tr. 361), Kalem (Tr. 579), and Boltz (Tr. 302) all agreed if anything was observed menacing the



propeller they would expect the deck department to notify the engine room at once. Upon receipt of a telephone call it would have taken "a few seconds to run down and push the button" to stop the propeller (Tr. 299). Kane summed up almost two pages (Tr. 351-352) with this admission:

"Q. And if such an action were taken, it is quite possible the damage to the propeller could be minimized or perhaps eliminated entirely?"

A. If the obstacle of which you speak drifted in and he did see that and did telephone or communicate and ask to have the propeller stopped, it could be minimized." (Tr. 353)

This conduct of libelant's servants reflects the continuing improper care they exhibited to the No. 15 and to the safety of the COTTON STATE. If libelant's other faults were not the sole and proximate cause of this casualty, the failure to avoid or minimize damages to both the vessels is cause for admiralty's equal division of damages.

*Southport Transit Company v. Avondale Marine Ways*, 5 Cir., 234 F.(2d) 947, collecting and discussing the cases;

*Segrave Transp. Co. v. Eskay Coal & Fuel Co.*, 2 Cir., 205 F.(2d) 257, holding a duty on the party to avoid the consequences of another's negligence arises even if the duty wrongfully thrust upon the party by another;

*The East Indian*, 2 Cir., 62 F.(2d) 242, 244, condemning officers in charge of the steamer who should have seen the danger of impending collision. "An officer should have readily seen and understood the danger."

### 3. Tug Did Not Cause No. 15 to Drift

We contend the evidence from libellant's deck witnesses does not establish the tug did anything to cause the No. 15 to drift into collision after substitution of the line. Dusevoir did not testify about the tug's movements. Neither did Fulmer except as to what occurred after he observed the No. 15 clearly drifting onto the propeller (Tr. 222). McLaughlin's contribution was:

“Q. After the substituted line was led from the ship to the scow, did you observe what the tug did after it took in its line?

A. No, sir.” (Tr. 182)

What the evidence shows is that after the tug took in her line from No. 25 she proceeded to shift aft to pick up the No. 15 which had been ordered placed forward on the COTTON STATE. The order for the switch of the two scows had been made by a person on deck of the COTTON STATE whose identity was never established (Tr. 133, 136, 163-167). This individual was not an employee of either appellant (Tr. 437, 517, 545, 569). Chief Officer McLaughlin, who stood “three to six feet” from this gentleman (Tr. 141) as the scows were brought alongside and overheard the order to change positions, never bothered to identify him (Tr. 122, 137, 163-167). To those on the tug this person gave full evidence of authority on behalf of the COTTON STATE (Tr. 494, 545). The chief mate acquiesced in all that he did (Tr. 123, 172).

Working from her towing position at the No. 25's bow the tug, after taking aboard her line, proceeded

ahead "to get away from the scow a little bit" and then backed out in the slip, maneuvering to change heading and to go back to the tail show (Tr. 470). From then until the trouble was observed the tug did not contact or touch the scows (Tr. 471, 525, 551). Actually the tug was twenty-five or thirty feet off from the No. 15 when she was first seen rocking and rolling (Tr. 471).

This court must examine the record to determine if the ruling of the trial court was clearly erroneous. *Titus v. S.S. Santorini*, 9 Cir., 258 F.(2d) 352. Some credible evidence must appear in the record to support a finding. Without it a reversal is required.

### CONCLUSION

Appellants submit that after a review of the record and application of controlling principles this Court can only be "left with the definite and firm conviction that a mistake has been committed." *States Steamship Co. v. Permanente Steamship Corp.*, *supra*. The performance of those on the COTTON STATE was the sole and proximate cause of the damages to the propeller and the scow. It was no better than the "milk and water" conduct of the ship's officer condemned in *Weishaar v. Kimball S.S. Co.*, 9 Cir., 128 Fed. 397.

The decree in favor of States Marine and denying Eclipse's damages from the steamship owner should be reversed.

Respectfully submitted,

BOGLE, BOGLE & GATES

CLAUDE E. WAKEFIELD

EDWARD C. BIELE

*Proctors for Appellant.*

## APPENDIX A

## Table of Exhibits

<i>Description</i>	<i>Identified</i>	<i>Offered</i>	<i>Received</i>
ough deck log book from COTTON STATE....	89	112	112
hotostat of deck bell book from COTTON STATE .....	92	112	112
mooth deck log book from COTTON STATE .....	114	115	115
COTTON STATE's Chief Mate's sketch.....	125	127	128
-2 type vessel profile or capacity plan.....	198	199	199
ough engine room log book from COTTON STATE .....	237	237	238
mooth engine room log book from COTTON STATE .....	239	239	239
ngine room bell book from COTTON STATE.....	240	241	241
hoto, No. 2 blade of propeller.....	256	257	257
hoto, No. 1 blade of propeller.....	258	259	259
hoto, No. 3 blade of propeller.....	259	259	259
hoto, No. 2 blade of propeller.....	260	260	260
hoto, No. 2 blade of propeller.....	261	261	261
hoto, No. 2 blade of propeller.....	262	262	262
hoto, Nos. 1, 2 and 4 blades of propeller....	263	263	263
eck log from LEA MOE.....	486	487	487
<i>idents' Description</i>	<i>Identified</i>	<i>Offered</i>	<i>Received</i>
Photo, damage scow ECLIPSE No. 15.....	421	433	433
U.S. Coast Geodetic Survey Chart No. 6448 .....	457	458	459

